

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Settlement Agreement"), is made and entered into by and between the People of the State of California *ex rel.* the Regional Water Quality Control Board, San Diego Region ("Plaintiff" or "Regional Board"), and the City of San Diego ("Defendant" or "City"). The Regional Board and the City are sometimes hereinafter collectively referred to as the "Parties," or separately as a "Party." The Parties are entering into this Settlement Agreement based on their collective desire to resolve those claims between Plaintiff and Defendant in the People of the State of California *ex rel.* Regional Water Quality Control Board, San Diego Region v. City of San Diego, (Case No. 03-CV-1381- J(LSP)), ("the State's lawsuit.")

THEREFORE, for the consideration recited herein, which shall be all of the obligations set forth below, the Parties agree as follows:

1. Since 1995, the City has discharged sewage and sewage effluent from its sanitary sewage collection system into waters of the state, including navigable waters of the United States and tributaries thereof, within the San Diego Region from the City's sewage conveyance system upstream of the City's treatment plant(s) and into the City's municipal separate storm sewer system, which ultimately discharges to coastal waters of the United States within the San Diego Region. The Regional Board contends that these discharges have violated the terms and conditions set forth in waste discharge requirements prescribed by the Regional Board in the following orders:

- a. Order Nos. 95-106 and 2002-0025 [National Pollutant Discharge Elimination System ("NPDES") number CA0107409] NPDES requirements for the City's wastewater treatment system ("NPDES POTW Requirements");

- b. Order No. 96-04, non-NPDES requirements governing the City's sewage conveyance system ("Sanitary Sewer Overflow Prohibition"); and
- c. Order Nos. 90-42 and 2001-001 [NPDES number CAS0108758] NPDES requirements applicable to the City's Municipal Separate Storm Sewer System ("MS4 Requirements").

The Regional Board issued all of these waste discharge requirements under the Porter-Cologne Water Quality Control Act, Division 7, commencing with Section 13000, of the California Water Code ("the Porter-Cologne Act"). The NPDES POTW requirements and the MS4 requirements implement applicable provisions of the federal Clean Water Act, 33 U.S.C. sections 1250, *et seq.*, and the federal NPDES program mandated by Section 402 of the Clean Water Act, 33 U.S.C. 1342, pursuant to Chapter 5.5 of the Porter-Cologne Act, Cal. Wat. Code, §13370, *et seq.* The NPDES POTW requirements were issued jointly with the issuance by the United States Environmental Protection Agency ("U.S. EPA") of identical NPDES permits that waived the requirement for secondary treatment of sewage as authorized by Section 301(h) of the Clean Water Act. (See CWA § 301(h) [33 U.S.C. § 1311(h)].) All of these orders contained complementary requirements prohibiting discharge of sewage from City's sanitary sewage collection system upstream of treatment facilities. These discharges have been reported by the City of San Diego as required by Regional Board Order No. 96-04.

2. The Regional Board filed Case No. 03-CV-1381 because U.S. EPA instituted a lawsuit against City for civil penalties and injunctive relief arising from City's alleged ongoing violations of the Clean Water Act in United States of America v. City of San Diego, Case No. 03-CV-1349 K (POR) ("EPA lawsuit"), which was consolidated with a similar case brought by

environmental groups in San Diego Baykeeper, et al. v. City of San Diego, Case No. 01-CV-0550B (POR) ("Baykeeper lawsuit.") The Clean Water Act requires that the state must be joined as a party whenever the United States brings a civil action against a municipality located in the state. [33 U.S.C. section 1319(e)]. Therefore, the Regional Board filed the State's lawsuit, which was consolidated by stipulation with the EPA lawsuit and the Baykeeper lawsuit.

3. The City has indicated it is entering into a Consent Decree to settle the EPA lawsuit and the Baykeeper lawsuit. The terms and definitions of any Consent Decree, judgment, or other agreement entered (1) between those parties in the consolidated EPA and Baykeeper lawsuits, or (2) between the City and any other person, firm, or entity, are not applicable to any of the terms of this Settlement Agreement between the Regional Board and the City. Nothing in any Consent Decree, judgment, or other agreement filed in the consolidated EPA and Baykeeper lawsuits, or between the City and any other person, firm, or entity can be used by the City as an offset, or affirmative defense, including but not limited to *res judicata* or collateral estoppel, as to any term in this Settlement Agreement, or as to any unauthorized sewage spill, release, discharge, or overflow, or any "sanitary sewer overflow," that occurs after October 1, 2004. Except as otherwise provided herein, nothing in this Settlement Agreement shall be interpreted to divest the Regional Board of its independent authority (administrative or otherwise) to regulate, monitor, and take enforcement action after October 1, 2004 regarding any discharges under its jurisdiction, including, but not limited to the issuance, implementation, and enforcement of regulatory or enforcement Orders, whether listed in this Agreement or not. In addition, except as expressly stated in Paragraph 11.A. of this Agreement, the State's lawsuit and this Settlement Agreement and Release shall not be construed as a waiver by the Regional Board of its right and authority to implement, enforce, regulate or monitor, any

provisions of the Porter-Cologne Act, including Chapter 5.5 of the Porter-Cologne Act, and all other administrative, legal, and equitable remedies available to Plaintiffs. Except as otherwise provided herein, nothing in this Settlement Agreement shall be construed as a waiver by the City of any right or defense that it may have with respect to any such enforcement or regulatory action initiated by the Regional Board.

4. Nothing in this Settlement Agreement shall apply to past sewage spills or overflows that have previously been the subject of completed enforcement actions by the Regional Board. In addition, the Regional Board has required the City to comply with various and ongoing clean-up and abatement orders and other administrative decrees. None of the decrees, administrative orders or previous payments shall in any way be affected by this Settlement Agreement. This Settlement Agreement and the terms herein are separate and distinct from any other orders or payments previously made by the City, which shall not be affected by this Settlement Agreement.

5. Except as otherwise provided herein, this Settlement Agreement shall not be construed to limit the rights of the Regional Board to obtain penalties or injunctive relief or to implement regulations, under federal and state laws, regulations or permit conditions. Except as otherwise provided herein, the Regional Board further reserves all legal and equitable remedies, including but not limited to injunctive relief, to address any sewage spill or overflow, or any unauthorized actual or threatened discharge, or threat of pollution or nuisance, or any imminent endangerment to the public health or welfare or to the environment occurring after October 1, 2004. Except as otherwise provided herein, the City reserves any and all rights it may have with respect to the aforementioned rights of the Regional Board.

6. This Settlement Agreement is neither a permit nor a modification of existing permits or waste discharge requirements under any federal, state or local law and in no way relieves the City of its responsibilities to comply with all applicable federal, state, and local laws and regulations, including plans, policies, and administrative orders implementing those laws and regulations.

7. This Settlement Agreement does not relieve the City of any obligations to apply for, obtain, and comply with the requirements of, any new or existing NPDES permit or requirements, or City's duty to comply with the Clean Water Act, the Porter-Cologne Act, and any other applicable federal and state laws, regulations, permits, and any administrative orders issued by the Regional Board.

8. Each Party is willing to enter into this Settlement Agreement only upon the assurance that the other Party is willing to comply with the obligations imposed under this Settlement Agreement.

9. Within 30 days of the execution of this Settlement Agreement by the Parties, City shall tender and deliver 1.2 million dollars (\$1,200,000.00) as required by the Regional Board in full satisfaction of City's liability or potential liability for any past sewage spills or overflows that have not been the subject of prior enforcement action by the Regional Board, up to and including October 1, 2004, as limited by the express provisions of all other paragraphs contained in this Settlement Agreement:

A. Two hundred thousand dollars (\$200,000.00) payable to the State Water Resources Control Board Cleanup and Abatement Account (CAA);

B. Two hundred sixty thousand dollars (\$260,000.00) payable to the Southern California Coastal Water Research Project for the purpose of conducting a Regional Board sediment

toxicity source analysis water quality project in Chollas Creek;

C. Five hundred thousand dollars (\$500,000.00) payable to an interest bearing escrow account to fund water quality related monitoring in San Diego Bay and Mission Bay as directed by the Regional Board.

D. Two hundred forty thousand dollars (\$240,000) payable to the San Diego River Conservancy for the purpose of providing funding for water quality related projects within the San Diego River Watershed.

10. Upon receipt of all funds as described in paragraph 9 above, the Regional Board will dismiss the State lawsuit with prejudice, and will take no further enforcement action for sewage spills or overflows that occurred up to and including October 1, 2004.

11. The following releases shall become effective upon the Parties' execution of this Settlement Agreement and Release and the payment described in Paragraph 9 described above.

A. Release of City. The Regional Board, and its past and present agents, related entities, employees, fiduciaries, attorneys, successors, assigns, affiliates, directors, officers, members, representatives, hereby forever releases, waives, and discharges City and its past and present agents, related entities, employees, subsidiaries, shareholders, partners, fiduciaries, attorneys, successors, assigns, affiliates, directors, officers, members and representatives, and each of them, from any liability for sewage spills or overflows up to and including October 1, 2004.

B. Release of Regional Board. The City, and its past and present agents, related entities, employees, fiduciaries, attorneys, successors, assigns, affiliates, directors, officers, members, representatives, elected officials, hereby forever releases, waives, and discharges the Regional Board and its past and present agents, related entities, employees, subsidiaries, shareholders, partners,

fiduciaries, attorneys, successors, assigns, affiliates, directors, officers, members and representatives, and each of them, from any liability for sewage spills or overflows up to and including October 1, 2004.

C. Reserved Claims. Notwithstanding any other provision of this Settlement Agreement, nothing in this Settlement Agreement is intended to release the Parties from their obligations under this Settlement Agreement, or to waive the Regional Board's continuing obligations imposed upon it by law. This settlement shall not limit or restrict the Regional Board, or any other state agency, in the continuing exercise of its, or their, continuing obligations to regulate the City's operation of its wastewater collection and treatment system. The City reserves all rights that it may have to respond to any such action by the Regional Board, as described in Paragraphs 3 and 5 of this Settlement Agreement.

D. Civil Code section 1542 waiver. The Regional Board and the City acknowledge that they are familiar with section 1542 of the California Civil Code, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

The Regional Board and City, subject to the provisions and exclusions in this Settlement Agreement hereby waive and relinquish any rights or benefits they have under California Civil Code section 1542 with respect to any other claims against each other arising from, or related to, any event described in Paragraph 1 occurring up to and through October 1, 2004.

12. No Third Party Benefits. This Settlement Agreement is made for the sole benefit of the Parties and no other person or entity shall have any rights or remedies under or by reason of this Settlement Agreement unless otherwise expressly provided for herein.

13. Entire Agreement. This Settlement Agreement constitutes the entire understanding between the Parties as to the subject matter hereof and may not be modified, amended, or terminated except by written agreement signed by the Parties.

14. Approvals, Consents, Waivers. No approval, acceptance, or consent of a Party required by any provision of this Settlement Agreement, nor any waiver of any required approval, acceptance, consent or condition, shall be deemed to have occurred until set forth in writing, signed by the Party, and delivered to the other Party. Any consent or approval by a Party in any single instance shall not be deemed to be or construed or approved in any like matter arising at a subsequent date.

15. Cooperation/Documentation. The Parties will, at their own cost and expense, execute such other instruments, documents, information and data as may be reasonably necessary for the purposes of and to effectuate the terms of this Settlement Agreement.

16. Assignment. Subject only to the express restrictions contained in this Settlement Agreement, all of the rights, duties and obligations contained in this Settlement Agreement shall inure to the benefit of and be binding upon the Parties, and their successors and assigns.

17. Attorneys' Fees. Each Party shall bear its own costs and attorneys' fees, and any other expenses, related to all matters subject to resolution by this Settlement Agreement, including such costs, fees, and expenses incurred for administrative proceedings, litigation, and mediation. If any Party brings an action to enforce the terms of this Settlement Agreement, or to declare rights

hereunder, the prevailing Party in such action shall be entitled to its reasonable attorneys' fees and costs, to be paid by the losing Party as awarded by the court or arbitrator.

18. Headings. Headings herein are used for convenience of reference only and do not define or limit the scope of provisions of this Settlement Agreement.

19. Severability. If any provision of this Settlement Agreement, or part thereof, is held invalid, void or voidable as against public policy or otherwise, the invalidity shall not affect other provisions, or parts thereof, which may be given effect without the invalid provision or part. To this extent, the provisions, and parts thereof, of this Settlement Agreement are declared to be severable.

20. Reliance. Each Party declares and represents that this Settlement Agreement is being made without reliance upon any statement or representation not contained herein of any other Party, or of any agent or attorney of any other Party. Each Party represents to each other Party that it has reviewed each term of this Settlement Agreement with its counsel and that it shall not dispute the validity of this Settlement Agreement on the ground that it did not have advice of its counsel.

21. Controlling Law; Venue. This Settlement Agreement is being made and delivered and is intended to be performed in the State of California and the execution, validity, construction, and performance of this Settlement Agreement shall be construed and enforced in accordance with the laws of the State of California. This Settlement Agreement shall be deemed made and entered into in San Diego County, which shall be the exclusive venue for any action relating to this Settlement Agreement.

22. Warranties of Authorities and Against Prior Assignments. Each person who signs this Settlement Agreement on behalf of a Party warrants and represents to every other Party that he or she has the authority to make this Settlement Agreement on behalf of the other Party for which he or

she signs. Each of the Parties to this Settlement Agreement represents and warrants that it is the sole and exclusive owner of the rights, claims and causes of action herein released and that it has not heretofore assigned or transferred or purported to assign or transfer to any other person or entity any obligations, rights, claims, or causes of action herein released.

23. Counterparts. This Settlement Agreement may be signed in counterparts, each of which shall be deemed an original, and not merely a recital. This Settlement Agreement supersedes all prior representations and agreements, if any, between the Parties or their legal counsel regarding its subject matter.

24. Integration. This is an integrated agreement. The terms of this Settlement Agreement are contractual, and not merely a recital. This Settlement Agreement supersedes all prior representations and agreements, if any, between the Parties or their legal counsel regarding its subject matter.

25. Knowing, Free and Voluntary Making. The Parties have read the Settlement Agreement, and acknowledge that they know and fully understand its contents. The Parties acknowledge that they have fully discussed this Settlement Agreement with their respective attorneys and fully understand the consequences of this Settlement Agreement. The Parties have relied and are relying solely upon their own judgment, belief and knowledge of the nature, extent, effect and consequences relating to this Settlement Agreement and/or upon the advice of their own legal counsel concerning the legal and income tax consequences of this Settlement Agreement. The Parties will execute the Settlement Agreement freely and voluntarily.

26. Notices. Notices concerning this Settlement Agreement shall be sent by certified mail to the following addresses. Any party may notify the other parties of a change of notice address by letter sent by certified mail.

John Robertus, Executive Officer
Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Scott Tulloch, Metropolitan Wastewater Department Director
City of San Diego
9192 Topaz Way, MS 901A
San Diego, CA 92123-1119

IN WITNESS WHEREOF, this Settlement Agreement and Release is executed by the Parties acting by the through each Party's authorized agent listed below:

DATED: REGIONAL WATER QUALITY CONTROL BOARD,
SAN DIEGO REGION

By: _____
John Robertus
Executive Director

DATED: THE CITY OF SAN DIEGO

By: Richard Mendes 2/3/05
Richard Mendes
Deputy City Manager